Supreme Court, U. S.
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in the Supreme Court of the United States

CASE NO. [redacted]

74-320

DADE COUNTY, a political subdivision of the State of Florida; R. RAY GOODE, as County Manager of Dade County, Florida; A. H. BLAKE, as Acting Tax Assessor of Dade County, Florida; R. K. OVERSTREET, as Tax Collector of Dade County, Florida; and J. ED STRAUGHN, Director, Department of Revenue, State of Florida,

Petitioners,

vs.

MARINE EXHIBITION CORPORATION, a Florida corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

STUART SIMON
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MIAMI REVIEW — 371-4853 — 377-3721

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in the
Supreme Court
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United States

CASE NO. _____

DADE COUNTY, a political subdivision of the State of Florida; R. RAY GOODE, as County Manager of Dade County, Florida; A. H. BLAKE, as Acting Tax Assessor of Dade County, Florida; R. K. OVERSTREET, as Tax Collector of Dade County, Florida; and J. ED STRAUGHN, Director, Department of Revenue, State of Florida,

Petitioners,

vs.

MARINE EXHIBITION CORPORATION, a Florida corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioners, the Dade County taxing authorities, pray that this Court issue a writ of certiorari to review the judgment of the District Court of Appeal of Florida, Third District, entered in *Dade County etc., et al v. Marine Exhibition Corporation*, 296 So.2d 652 (3d D.C.A., Fla. 1974)[1]

JURISDICTION

The judgment of the District Court of Appeal of Florida, Third District, was entered on June 25, 1974. No rehearing was applied for. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(3).

QUESTIONS PRESENTED

Can the Miami Seaquarium be exempted from ad valorem taxation on the basis of the use it makes of its property, while other private tourist attractions which put their property to the same use as the Seaquarium are taxed?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is *U.S. Const.* amend. XIV §1 "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Marine Exhibition Corporation, a private corporation for profit, leases county-owned land and operates the

[1]A copy of the state appellate court opinion sought to be reviewed comprises pages 1-2 of the Appendix hereto.

Miami Seaquarium thereon as a tourist attraction (R. 108-109).

For 1972, the leasehold interest comprising the Seaquarium was taxed (R. 108-109).

The Seaquarium filed suit seeking exemption (R. 1-11).

By way of affirmative defense, the local taxing authorities averred that the exemption sought would amount to preferential tax treatment in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution (R. 106).[2]

In opposition to a motion for summary judgment, the tax assessor testified (by affidavit):

1. That other private tourist attractions in Dade County, such as the Miami Serpentarium, the Monkey Jungle, the Orchid Jungle and the Parrot Jungle, which made the same use of their property as the Seaquarium made of its property, were taxed; and

2. That over 23% of the total value of all property located in Dade County was exempted from taxation in 1972.

(R. 109)[3]

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[2]Page 3, Appendix hereto, *infra*.

[3]Pages 4-5, Appendix hereto, *infra*.

The trial court granted summary judgment declaring the leasehold interest comprising the Seaquarium to be exempt from taxation (R. 219-220).

The local taxing authorities appealed to the District Court of Appeal of Florida, Third District, assigning as error the trial court's entry of summary judgment (R. 222). The appellate court held that different treatment of members of the same class did not preclude summary judgment.

This petition for writ of certiorari ensued.[4]

REASONS FOR GRANTING THE WRIT

The decision below forces the local taxing authorities to participate in the denial of equal protection of the laws. The Seaquarium was judicially exempted from taxation on the basis of the use it made of its property.[5] All other private tourist attractions which made the same use of their properties as the Seaquarium made of its property were taxed. The opinion below, on its face, treats members

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[4]Petitioners have also sought certiorari from the Florida Supreme Court to review the decision below, *Dade County v. Marine Exhibition Corp.*, (Florida Supreme Court Case No. 45,923), (petition for certiorari filed July 25, 1974). Under Florida law, if the Supreme Court of Florida holds that it is without jurisdiction to entertain the petition for certiorari, the District Court of Appeal becomes the highest court from which a decision could be had. *See, Fla. Const.*, Art. V §3(b) 3; Florida Appellate Rule 4.5 c (6); *Ansin v. Thurston*, 101 So.2d 808, 810 (Fla., 1958). *Cf. Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446, 449, note 5. For this reason, petitioners have contemporaneously filed with their petition, a motion to defer consideration of petition pending the decision of the Supreme Court of Florida on the issue of its jurisdiction.

[5]Under Florida law, exemptions from ad valorem taxation are predicated upon use. *Straughn v. Camp*, 293 So.2d 689 (Fla., 1974).

of the same class differently. There is no reasonable basis for treating the Seaquarium differently from the Miami Serpentarium, the Parrot Jungle, the Orchid Jungle, the Monkey Jungle or any other private tourist attraction in greater Miami. *Cf. Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351, (1973); *United States v. Detroit*, 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424, (1958).

For the tax year involved in this case, the cumulative effect of exemptions on the property tax base for Dade County is staggering — almost one quarter of the property in the county (23%) was exempted. There was 14.4 billion dollars' worth of property in the county in 1972 — 3.4 billion dollars' worth of which was exempted (R. 109).[6]

Florida has judicially recognized that exemptions "cast a greater burden on other taxpayers." *State ex rel. Miller v. Doss*, 146 Fla. 752, 2 So.2d 303 (1941). The opinion below increases this already substantial burden by requiring members of the same class to be treated differently with no reasonable basis therefor.

Speaking for this Honorable Court on the issue of taxability of leasehold interests in government property, Mr. Justice Holmes wrote in *Trimble v. Seattle*, 231 U.S. 683, 689, 34 S.Ct. 218, 219, 58 L.Ed. 435 (1914):

> "If these leaseholds are not taxable, they are a favored class of property; for ordinarily leaseholds are taxed even if they are lumped and included in the value of the fee. When an interest

[6]Pages 4-5, Appendix hereto, *infra*.

> in land, whether freehold or for years, is severed from the public domain and put into private hands, the natural implication is that it goes there with the ordinary incidents of private property, and therefore is subject to being taxed."

The holding below is in direct conflict with the opinion of this Court.[7]

[7]The Seaquarium's motion for summary judgment against the local taxing authorities was granted. The trial court can enter judgment against the movant where the opposing party is entitled to judgment as a matter of law. *Calpinetta v. Schields*, 70 So.2d p. 573 (Fla., 1954); *Morrissey v. Curran*, 423 F.2d 393 (2d Cir., 1970), *cert. denied*, 399 U.S. 928, 90 S.Ct. 2245, 26 L.Ed.2d 796; 48 ALR 2d 1188.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

STUART L. SIMON

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Dade County Attorney
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Miami, Florida 33130

R. A. CUEVAS, JR.

R. A. Cuevas, Jr.
Assistant County Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 3 true and correct printed copies of the foregoing Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District were mailed this 18 day of September, 1974, to WOODROW M. MELVIN, JR., ESQUIRE, Mershon, Sawyer, Johnston, Dunwody & Cole, 1600 First National Bank Building, Miami, Florida 33131, Attorneys for Respondent.

STUART L. SIMON

STUART SIMON
Dade County Attorney

R. A. CUEVAS, JR.

R. A. Cuevas, Jr.
Assistant County Attorney

APPENDIX

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1974

CASE NO. 73-995

DADE COUNTY, etc., et al.,

Appellants,

vs.

MARINE EXHIBITION CORP.,
a Florida corporation,

Appellee.

Opinion filed June 25, 1974.

PER CURIAM.

The appellant is Dade County, Florida. It appeals a summary final judgment declaring that the leasehold interest of the Marine Exhibition Corporation is not subject to taxation. The Marine Exhibition Corporation is the operator of the Miami Seaquarium. The corporation obtained the property in 1954 upon a lease from Dade County after Dade County had secured the land from the State. The deed provided that the County was to use the land for a public purpose. Pursuant to this provision, the County leased the land for a marine exhibit. The County agreed that the leasehold interest would not be taxed unless the laws of the State required it to be, and no taxes were levied until 1969. The tax here concerned is for the year 1972.

In 1969, the Seaquarium property was exempted by the Board of Equilization and has been exempted as to the 1970 and 1971 taxes by order of the circuit court.

The appellant maintains that a genuine issue of material fact exists as to whether or not the property was on January 1, 1972 used for a public purpose. The only factual matter relied upon to create this issue is the affidavit of the then acting tax assessor of Dade County, as follows:

* * *

> "5. The predominant use made by the Marine Exhibition Corporation of the subject leasehold in 1972 was for a private, profit-making venture. More specifically, the vast majority of those members of the public who visited the Miami Seaquarium paid a substantial admission fee, the predominant portion of which inured to the private benefit of the Marine Exhibition Corporation. In this sense, the operation of the subject leasehold comprising the Miami Seaquarium is no different than other privately owned tourist attractions located in Dade County, Florida, which were not tax exempt for 1972 as: the Miami Serpentarium, the Monkey Jungle, the Orchid Jungle, the Parrot Jungle."

* * *

The affidavit is insufficient to raise an issue. The fundamental questions presented by this case have been answered by the Supreme Court of Florida in Dade County v. Pan American World Airways, Fla. 1973, 275 So.2d 505.

Affirmed.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY (Gen. Jur. Div.)

NO. 72-23072

MARINE EXHIBITION CORP.,
a Florida corporation, Plaintiff,

vs.

DADE COUNTY,
a political subdivision of the State of Florida, et al.,
Defendants.

DEFENDANTS' ANSWER TO COMPLAINT

Defendants answer the complaint filed herein as follows:

* * *

11. By way of affirmative defense, they state that the exemption sought by the plaintiff herein amounts to preferential tax treatment and would be violative of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

WHEREFORE, defendants pray that this cause be dismissed as to them with costs to be assessed against the plaintiff.

STUART SIMON
County Attorney
1626 Dade County Courthouse
Miami, Florida 33130

By: _____
R. A. Cuevas, Jr.
Assistant County Attorney

[CERTIFICATE OF SERVICE OMITTED]

[TITLE OMITTED]

AFFIDAVIT OF A. H. BLAKE

BEFORE ME, the undersigned authority, personally appeared A. H. BLAKE, who being first duly sworn, deposes on his oath and says:

1. I am over 21 years of age and otherwise sui juris.

2. I am currently employed by Dade County as Tax Assessor. As of January 1, 1972, I was Acting Tax Assessor.

3. As Acting Tax Assessor, I was charged with overall responsibility for determining the taxability of all property located within Dade County.

4. I am familiar with the financial operation and actual use made during the 1972 tax year of the subject leasehold comprising the Miami Seaquarium.

5. The predominant use made by the Marine Exhibition Corporation of the subject leasehold in 1972 was for a private, profit-making venture. More specifically, the vast majority of those members of the public who visited the Miami Seaquarium paid a substantial admission fee, the predominant portion of which inured to the private benefit of the Marine Exhibition Corporation. In this sense, the operation of the subject leasehold comprising the Miami Seaquarium is no different than other privately owned tourist attractions located in Dade County, Florida, which were not tax exempt for 1972 such as: the Miami Serpentarium, the Monkey Jungle, the Orchid Jungle, the Parrot Jungle.

6. For the 1972 tax year, the total value of real property, personal property, railroad and telegraph property located in Dade County was $14,419,981,729.00. The total value of exempt property for all exemptions allowable under Florida Statutes for the 1972 tax year was $3,406,234,031.00. The total value of taxable property in Dade County for the 1972 tax year was the difference between the above two figures: $11,013,747,698.00.

FURTHER AFFIANT SAYETH NOT.

/s/ A. H. Blake

A. H. BLAKE
Tax Assessor of Dade County

Sworn to and subscribed before
me on this 29 day of May, 1973.

/s/ Hazel Lee Pearsall

NOTARY PUBLIC
State of Florida at Large
My commission expires: Feb. 8, 1976

[CERTIFICATE OF SERVICE OMITTED]

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CASE NO. 74-320

DADE COUNTY, a political subdivision of the State of Florida; R. RAY GOODE, as County Manager of Dade County, Florida; A. H. BLAKE, as Acting Tax Assessor of Dade County, Florida; R. K. OVERSTREET, as Tax Collector of Dade County, Florida; and J. ED STRAUGHN, Director, Department of Revenue, State of Florida,

Petitioners,

vs.

MARINE EXHIBITION CORPORATION, a Florida corporation,

Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

INTRODUCTION

The Petitioners are the ad valorem tax authorities in in Dade County, Florida [hereinafter "Dade County" or "Petitioners"]. They were defendants in the Dade County Circuit Court (the trial court) and Appellants in the District Court of Appeal of Florida, Third District. Marine Exhibition Corporation was Plaintiff in the trial court and Appellee in the District Court of Appeal, Third District. Marine Exhibition Corporation will be designated herein as "Respondent."

Record references will be to the entire certified record in the Third District Court of Appeal. References thereto will be prefaced by the letter "R.", followed by the appropriate page number. Respondent's Appendix will be cited as "A.", followed by the appropriate page number. All emphasis herein is supplied unless otherwise noted.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is incomplete in the following particulars:

Marine Exhibition Corporation is a lessee, under the terms of a 1954 lease agreement, of certain land in Dade County, Florida, owned by Dade County. (R. 29). On the leased property is constructed a public marine aquarium for the exhibition of different species of fish, aquatic mammals, etc., which is known as the "Miami Seaquarium."

Dade County (the Petitioners herein) acquired the land for the Seaquarium site from the State of Florida in 1940 by a deed containing a restriction that lands be used *only for public purposes.* (R. 111-120). Pursuant to the

lease terms with the Petitioners, Respondent became *obligated* to erect and operate such a *public aquarium.* This was accomplished by Respondent, and on January 1, 1972 such a public marine aquarium was operating on the subject leasehold site and the courts below have judicially held that it was being used for a *public* (not a private) purpose on the aforesaid date. (R. 219-220).

The lease agreement between the Petitioners and Respondent provides that the local taxing authorities (the Petitioners) shall exercise substantial control over Respondent's leasehold use of the public land. Specifically, it provides that at the conclusion of the lease term, or upon its termination, the Petitioners acquire complete title and ownership to the operating facilities constructed on the property and any and all future improvements thereon. (R. 29-41). The Petitioners are paid a percentage of gross revenue from general admissions and gross revenue from incidental income, including the incidental concession income. (R. 29-41). Also, admission rates must be approved by the Dade County Commission, concessions may not be operated without their approval, the books of the Respondent are open at all times for inspection by the county, and specified insurance coverage on the facility is subject to county approval. (R. 29-41).

In their Statement of the Case, Petitioners have referred to "other tourist attractions" in an attempt to indicate a factual similarity between "tourist attractions" generally and the Respondent's leasehold use of this publically owned land. (R. 109).

However, no such "similarity" in fact exists. Apparently, Petitioners attempt to assert that "other private

tourist attractions" are in the same class for tax exemption purposes as Respondent because, they say, the "use" of the property is the same. However, Petitioners overlook several important differences in the comparison. Unlike a private tourist attraction, Respondent *leases county-owned land* and operates a marine exhibit thereon for a *public* purpose. Its leasehold interest in county-owned property when used for public purposes is tax exempt under Florida law. (R. 226-227). There is *absolutely no evidence* in the record (nor do the Petitioners contend) that the "other tourist attractions" referred to by Petitioners, such as the Miami Serpentarium, the Monkey Jungle, the Orchid Jungle or the Parrot Jungle[1] are either:

1. operated under *leases* which are being taxed by the Petitioners pursuant to Florida law authorizing a tax upon leasehold interests, as distinguished from being taxed for their ownership of the land in fee simple; or

2. if operated as leaseholds, that they lease their lands from the public or the government as the Respondent does so as to initially qualify for the exemption classification applicable to the Respondent; or

3. perform a public purpose thereon, according to Florida law.

Significantly, Petitioners do not point to or argue in their petition that *any* "tourist attraction" in Dade County

[1]These were the other "tourist attractions" mentioned in the Tax Assessor's affidavit in opposition to Respondent's motion for summary judgment in the trial court. (R. 109).

leased its land from the county and made an exempt use of its leasehold interest thereof for 1972 (as the undisputed facts below established did occur at the "Miami Seaquarium" leasehold facility). (R. 226-227). As will be explained more fully later, such differences are critical to Petitioners' alleged federal equal protection claim.

From the inception of the lease agreement between the Petitioners and Respondent in 1954 to 1961, leasehold interests (to be distinguished from fee title interests) in Florida, whether created in privately owned or governmental-owned property, were not subject to taxation. In 1961, the Florida legislature adopted F.S. §192.62, *Florida Statutes*,[2] which did provide for taxation of certain leasehold interests created in property owned by governmental agencies if not leased for a public purpose use. By its terms, the statute[3] expressly exempts public purpose uses when:

> "Governmental, municipal or public purpose or function shall be deemed to be served or performed when the lessee under any leasehold interest created in property of the United States,

[2]F.S. §192.62. *Florida Statutes*, subsequently reenacted verbatim in F.S. §196.25, *Florida Statutes* (1971), provided a statutory definition:

> [T]he property is owned or used by the State, any county, municipality, or public entity or authority created by statute *and is leased or otherwise made available to such person, firm, corporation, partnership or organization by such public body for a consideration in the performance by the public body of the public function or public purpose authorized by law*, or when property prior to the effective date of this act was leased for valuable consideration for the purpose not otherwise exempt hereunder.

[3]The present exemption statutes applicable to the 1972 exemption and this case are found in F.S. §196.199(2)(a) (1973) and F.S. §196.012(5) (1973).

> the State of Florida or any of its political subdivisions, or any municipality, agency, authority or other public body corporate of the state is demonstrated to perform a function or serve a governmental purpose which could properly be performed or served by an appropriate governmental unit, or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds. . . ." F.S. §196.012(5), *Florida Statutes.*

In light of this statute, the Petitioners did not attempt to assess ad valorem taxes against the Respondent until 1969. In that year, Respondent appeared before the Dade County Commission sitting as the tax Board of Equalization to contest the 1969 tax. The Board took testimony, and confirmed the fact that the "Miami Seaquarium" performed a public function and should, therefore, be exempted from ad valorem taxation. (R. 157). In 1970, 1971 and 1972 there was no change in the nature or character of the operations of the Seaquarium, except that substantial improvements in the facility were made. (R. 29). Nonetheless, in 1970, the Petitioners reversed their position and attempted to tax the leasehold interest which Respondent has in the publicly owned property. (R. 156-218). The same effort has been made for the tax years 1971, 1972 (the subject of the instant case), 1973 and 1974. Respondent's leasehold interest in the public property has been exempted from ad valorem taxation for the tax years 1970 and 1971 by order of the circuit court. The Petitioners have taken a consolidated appeal from those orders for the 1970 and

1971 tax years to the District Court of Appeal, Third District, and said appeals are presently pending before the court.[4]

The instant action was instituted on November 8, 1972 by the Respondent to adjudicate its right to have its leasehold interest in the aforesaid public land exempt from ad valorem taxation for the 1972 tax year. The issue before the trial court was whether Respondent's leasehold interest was (on January 1, 1972) used for a public purpose under state law. Upon motion by Respondent, the trial court entered summary final judgment holding, as a matter of law, that Respondent's leasehold interest was entitled to be exempt from ad valorem taxation for the 1972 tax year based on undisputed facts as to its public use as of January 1, 1972. The trial court made no express ruling on Petitioners' alleged federal equal protection argument. (R. 219-220).

This summary final judgment was affirmed *per curiam* by the District Court of Appeal, Third District, on the grounds that there was no dispute of material or genuine fact as to the "public use" of the leasehold by Respondent on January 1, 1972, and that Respondent's leasehold was exempt from taxation under applicable state law. (R. 226-227). Again, the appellate court opinion was silent as to any holding or ruling on Petitioner's federal claim. (R. 226-227).

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[4] *Dade County et al v. Marine Exhibition Corp.*, Nos. 73-1306 and 73-1307, District Court of Appeal of Florida, Third District. The only difference between the instant action and the consolidated appeal is that the consolidated appeal is from the final hearing before the court, and the instant action was disposed of by summary judgment.

On July 24, 1974 Petitioners timely filed a petition for certiorari in the Florida Supreme Court to review that decision of the Third District Court of Appeal, the same decision which they seek to review herein. (Petition for Certiorari, p. 4, n. 4; A. pgs. 1-21). Said petition for certiorari is presently pending there, the highest court of the State of Florida with possible jurisdiction over this cause. (Petition for Certiorari, p. 4; A. pgs. 1-21). The pending petition for certiorari before this Court was filed by Petitioners on September 20, 1974.

ARGUMENT

QUESTION PRESENTED (Restated)

DID THE STATE COURT DECIDE A FEDERAL QUESTION OF SUBSTANCE NOT THERETOFORE DETERMINED BY THIS COURT, OR DECIDE IT IN A WAY PROBABLY NOT IN ACCORD WITH DECISIONS OF THIS COURT WHEN IT RULED THAT A LEASEHOLD INTEREST IN PUBLIC LAND USED FOR A PUBLIC PURPOSE WAS EXEMPT FROM AD VALOREM TAXATION UNDER STATE LAW?

(i) *The Judgment below is not the judgment of the highest court in the State of Florida*

Before considering whether Petitioners have satisfied the requirements of Rule 19, *Supreme Court Rules*, for reviewing decisions of state courts, an obvious jurisdictional defect under 28 U.S.C.A. §1257(3) exists in the pending petition for certiorari which requires a denial thereof.

Petitioners invoke 28 U.S.C.A. §1257(3) for the certiorari jurisdiction of this Court, which provides in pertinent part:

> *Final judgments or decrees rendered by the highest court of a State in which a decision could be had*, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, *or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.*

Under this provision, Petitioners have sought review of the judgment of an intermediate state appellate court, the District Court of Appeal of Florida, Third District, even while a discretionary petition for certiorari to review the same decision is pending in the Florida Supreme Court, the highest court in the State of Florida. (Petition for Certiorari, p. 4; A. pgs. 1-21)

A state court judgment, to be within the jurisdiction of this Court under §1257 must be "final" in two senses: (a) it must be subject to no further review or correction in any other state tribunal, and (b) it must be an effective determination of the litigation. In other words, it must be the final word of a final court. *Market St. Ry. Co. v.*

Railroad Comm'n, 324 U.S. 548 (1945). The petition herein patently fails to meet the first requirement of "finality."

This Court has consistently held that a petition for certiorari to an intermediate state appellate court is improper when there is pending a discretionary writ to the highest state court to review the same decision. In *American R. Express Co. v. Levee*, 263 U.S. 19 (1923), Mr. Justice Holmes stated for the Court:

> A preliminary objection is urged that the present writ of certiorari was addressed to the court of appeal, and not to the supreme court. But, under the Constitution of the state, the jurisdiction of the supreme court is discretionary (Art. 7, §11); *and although it was necessary for the petitioner to invoke that jurisdiction in order to make it certain that the case could go no farther.* (Stratton v. Stratton, 239 U.S. 55, 60 L.Ed. 142, 36 Sup. Ct. Rep. 36), *when the jurisdiction was declined, the court of appeal was shown to be the highest court of the state in which a decision could be had. Id.* at 20-21.

See also, Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 at n. 1 (1968); *Annotation*, 7 L.Ed. 2d 1025 (1962). Also, in *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967), the Court, speaking through Mr. Justice Black, recognized and reaffirmed this principle when it stated that *only after* it was determined that the petitioners therein could not call upon the Florida Supreme Court for review, could the Florida District Court of Appeal be considered the "highest court in Florida" wherein a decision could be

had as required by 28 U.S.C.A. §1257(3). *Id.* at 238, n. 2. *See also, Stratton v. Stratton*, 239 U.S. 55 (1915) (writ of error).

This petition for certiorari to the Florida District Court of Appeal, while a discretionary writ is pending before a higher state court, is obviously premature and should be denied for want of jurisdiction.

It avails Petitioners nothing to attempt to avoid the consequences of their premature petition by seeking a delay in its consideration by this Court until after the Florida Supreme Court rules on its jurisdiction.[5]

First, it is respectfully submitted that this Court simply does not have jurisdiction to entertain such an untimely and premature petition. 28 U.S.C.A. §1257(3). Yet, there are also practical reasons to reject Petitioners' attempt to delay consideration of its petition and deny the petition. Assuming, *arguendo*, that certiorari would ever lie to review the issues raised in this action, it appears that there is sufficient time and an adequate mode of relief open to Petitioners if they wish to seek this Court's review after the Florida Supreme Court completes its review. *See American Railway Express Co. v. Levee, supra* at 21. If required to await the decision of the Florida Supreme Court to seek this Court's review, Petitioners would not suffer any prejudice or harm. Conversely, if this Court defers consideration of this premature and untimely petition, it would result in unnecessary and duplicative expense

[5]Petitioners have filed a "Motion to Defer Consideration of Petition for Certiorari" simultaneously with their petition, which is not authorized by the *Supreme Court Rules*, and for the reasons stated herein and in Respondent's Response filed of record on or about September 27, 1974, should be denied.

to the parties and be a waste of judicial time and effort for the reasons set forth in Respondent's Response to Petitioners' Motion to Defer Consideration of Petition of Certiorari, filed of record on or about September 27, 1974. Sound judicial economy requires a denial of the motion to defer consideration.

Thus, the pending petition for certiorari should be duly considered by the Court, and denied for want of jurisdiction.

(ii) *The state court did not pass upon a reviewable federal question in conflict with applicable decisions of this Court.*

Petitioners have failed to satisfy the Rule 19(a), *Supreme Court Rules*, criteria for reviewing decisions of state court judgments. In such cases, certiorari will be granted to review a state court judgment if (a) a state court has decided a federal question of substance not theretofore determined by this Court, or (b) has decided it in a way probably not in accord with applicable decisions of this Court. These elements necessary for certiorari review must be considered in the context of this Court's practice not to undertake review of state court judgments which do not pass upon federal questions of substance or importance. *Rice v. Sioux City Memorial Park Cem.*, 349 U.S. 70 (1955); *State of Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950).

Before taking up the arguments under this point, it is necessary to correct the record and call to the Court's attention a misstatement of the Petitioners in what they describe as the "ruling" by the court below on Petitioners'

alleged federal claim. Petitioners assert that "the appellate court held that different treatment of members of the same class did not preclude summary judgment." (Petition for Certiorari, at p. 4). This simply is not accurate. Not one of the courts below have ever said one word about the Petitioners' alleged federal equal protection claim. It did not seem to merit comment.

To satisfy the requirements of certiorari jurisdiction, it is axiomatic that a federal question must be determined and passed upon by the state court. *Durley v. Mayo*, 351 U.S. 277 (1956); *Mental Hygiene Dept. of Cal. v. Kirchner*, 380 U.S. 194 (1965). But, the opinion below is simply a state court decision construing a state ad valorem tax exemption statute and its factual application to the Respondent. Even a cursory review of the state court opinion supports this construction. After a brief recitation of the facts, the Third District Court of Appeal summed up the issue before it:

> The appellant [Petitioners] maintains that a genuine issue of material fact exists as to whether or not the property was on January 1, 1972 used for a public purpose.

The appellate court went on to quote the exact portion of the affidavit[6] that Petitioners cite to in their petition, and to hold:

> The affidavit is insufficient to raise an issue. The fundamental questions presented by this case have

[6]The affidavit of A. H. Blake in opposition to Respondent's Motion for Summary Judgment. (R. 109).

been answered by the Supreme Court of Florida in *Dade County v. Pan American World Airways*, Fla. 1973, 275 So.2d 505.

Affirmed.

In so holding, the District Court of Appeal stated that it was undisputed in the record that Respondent's leasehold was used for a "public purpose" and that summary judgment in Respondent's favor was appropriate in light of the Florida Supreme Court's opinion in *Dade County v. Pan American World Airways, supra*, (R. 226-227). The alleged federal equal protection claim of Petitioners was not even mentioned by the District Court of Appeal in its opinion. (R. 226-227). Certainly, it hardly can be seriously contended, as the Petitioners do, that the court "*held* that different treatment of the same class did not preclude summary judgment." (Petition for certiorari, p. 4). At best, Petitioner's alleged federal claim was only implicitly, by its terms, considered and passed upon by the state appellate court.[7] *Chapman v. Crane*, 123 U.S. 540 (1887).

Even assuming that a federal right was passed upon by the state court, it is clear that there is no reviewable federal question proper for the certiorari jurisdiction of this Court.

[7] It may, in fact, be argued that there was no determination of any federal right by the state appellate court. Numerous cases can be cited for the principle that where a federal question was not determined by the state court (and there were valid reasons for the court not to do so), and the federal question was not necessary to the judgment rendered by the state court, this Court does not have certiorari jurisdiction. *Honeyman v. Hanan*, 300 U.S. 14 (1937); *Lynch v. New York*, 293 U.S. 52 (1934). And this is particularly so where the federal right arises, as it allegedly does here, under the third clause of 28 U.S.C.A. §1257. *Harding v. Illinois*, 196 U.S. 78 (1901).

In deciding that Respondent's leasehold interest was exempt from ad valorem taxation for the 1972 year, the state court below construed the applicable state ad valorem tax statutes as interpreted by the state courts in Florida. The decision below specifically cited *Dade County v. Pan American World Airways, Inc.*, 275 So.2d 505 (Fla. 1973), one of the more recent and controlling state decisions in Florida on ad valorem tax exemption for leasehold interests. In that case, the Florida Supreme Court affirmed a summary judgment entered against Dade County (the same petitioners herein) on the issue of the "public purpose" exemption claimed by various commercial airlines and others at the Miami International Airport. In *Pan American*, the county sought to tax the leasehold interests of the commercial airlines at the airport for the 1970 tax year. The airport site is owned by the public (county) and portions thereof are leased to various private businesses for their commercial operations. The Florida Supreme Court, in interpreting the applicable state law,[5] held that a private leasehold interest on public land is tax exempt if the underlying object of the lessee's private, commercial operation is the performance of a "public purpose." In explaining this conclusion, the Florida Supreme Court said:

> By this analysis we have not changed the ordinary meaning of 'exclusive' from its dictionary definition of 'single', 'sole' and 'entirely'. Instead, we have pointed out that the requirement for 'exclusive *use*' (emphasis by the Court) is not affected by a private purpose incorporated into the meaning of 'public purpose.' Stated in another

[5] F.S. §196.25. *Florida Statutes*, substantially same statute (renumbered F.S. §196.199(2)(a)) relied upon by Respondent for exemption of its leasehold interest.

> way, the property must be used *exclusively* (emphasis by the Court) for purposes designated as 'public purposes' which may include such an incidental private purpose as here . . .
>
> • • •
>
> Applying these principles to the situation before us, we conclude that the property leased to the airline is used *exclusively* (emphasis by the Court) for public purposes. The parties have stipulated that the airport facility is used for a public purpose; *the incidental private purpose of a profit-making venture by the airline has merged into the meaning of the stipulated 'public purpose'*; and there is no evidence in the record whatever to indicate that the property is not being used solely for the stated 'public purpose'.
>
> *Id.* at 512.

Relying on this interpretation of the state tax statutes by the Florida Supreme Court, the appellate court in the decision herein simply held that Respondent's use of its leasehold interest was for a "public purpose" under the exemption statutes and was entitled to be exempt from ad valorem taxation for the 1972 tax year.

It is apparent then that there is no reviewable federal question raised by the decision of state court. The state court judgment below merely construed the applicable state ad valorem tax statutes as interpreted by the Florida Supreme Court in *Dade County v. Pan American World Airways, Inc., supra.* The decision below did not affect any federal right, title or immunity of Petitioners which would require this Court's certiorari jurisdiction under

28 U.S.C.A. §1257(3) since the state court merely held that there was no genuine issue about the fact that Respondent's use of the subject leasehold property satisfied the "public purpose" test of *Dade County v. Pan American, supra*, and F.S. §196.25, *Florida Statutes* (1971).[9] In sum, state law, and the construction by the state courts of that law, was an independent and proper basis for the state court's judgment which this Court usually will not construe or review. *Flourney v. Weiner*, 321 U.S. 253 (1944) and cases cited therein. Petitioners should not be permitted to seek this Court's review merely because they are dissatisfied with the ruling of the state court on the tax exemption of Respondent's leasehold interest.

Despite a conclusionary statement in their petition, Petitioners fail to demonstrate that the judgment below conflicts with or in any way is not in accord with applicable decisions of this Court. Rule 19, *Supreme Court Rules.* Petitioners do cite *Trimble v. Seattle*, 231 U.S. 683 (1914), but just make the unsupported assertion that the state court decision below conflicts with it. (Petition for Certiorari, p. 6). However, in *Trimble*, this Court stated that leasehold interests severed from the public domain, *and "put into private hands . . . with the ordinary incidents of private property"* are taxable. *Id.* at 690. The *Trimble case*, and the state court opinion below are materially different. Respondent has a leasehold interest controlled by the local taxing authorities, the Petitioners herein, which is used for a public purpose under local Florida tax law and which clearly lacks the "ordinary incidents of private property." (R. 29-41). *Trimble v. Seattle, supra.*, at 690. For example, at the conclusion of the lease term,

[9] F.S. §196.199(2)(a), *Florida Statutes* (1973).

the Petitioners acquire complete title to all the improvements constructed by Respondent, and all the equipment free of any right or interest of the Respondent. (R. 29-41). Further, Petitioners control the admission rates, and concessions, the books of Respondent are compelled to be open for inspection by the Petitioners at all times, and the specified insurance coverage of the facility is subject to county approval. (R. 29-41). The Petitioners are paid a percentage of gross revenue from general admissions and gross revenue from incidential income, including concessions, and, finally, the Petitioners' title to the land contains an express deed restriction limiting it to "public purpose" uses. (R. 29-41). Based, in part, on these undisputed facts, the court below held that Respondent's leasehold interest was used for a "public purpose" and therefore entitled to be exempt from ad valorem taxation in 1972. (R. 226-227).

None of these facts evidencing public control over Respondent's leasehold interest were present in *Trimble*, and Respondent's leasehold interest hardly possesses the "ordinary incidents of private property." It is submitted, therefore, that the analogy to *Trimble* cannot be accepted and that the decision below is not in conflict with *Trimble v. Seattle, supra.*

Petitioners cite no other decision of this Court in conflict with the decision of the court below. In fact, prior decisions of this Court are consistent with the opinion below. Reasonable differences or classifications in tax treatment have been consistently upheld by this Court. In *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959), this Court stated the equal protection standard thusly:

> [T]he [equal protection] clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation.
>
> * * *
>
> To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.
>
> * * *
>
> *The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation of the object of the legislation.'*
> *Id.* at 527-8.

See also, Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973), and cases cited therein; *Citizens Nat. Bank v. Durr*, 257 U.S. 106 (1921); *Armour Packing Co. v. Lacy*, 200 U.S. 451 (1906). This Court has had repeated occasion to sustain discriminations founded upon reasons more obsure than the one alleged in the present case. *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89 (1900); *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232 (1890).

Yet, Petitioners make the unsupported argument that this Court should take certiorari jurisdiction because, they claim, the Respondent's leasehold interest from county land has received preferencial tax treatment in violation of the equal protection clause. Even a cursory review of the record will indicate that this is utterly frivolous.

It is undisputed in the record that Respondent's *leases county-owned land* for the maintenance and exhibition of a *public* marine-life facility, and that such a marine-life facility constitutes a "public purpose" under Florida law. (R. 226-227). Similarly, the Petitioners make no claim that the other "tourist attractions", who allegedly make "the same use" of their property as the Respondent does, *are leasehold interests* and, even if they were leasehold interest, no claim is made that they *lease their lands from the government or public* as the Respondent does. Nor is it contended that they make *exempt* uses of their respective sites. In the absence of any contention that these "other tourist attractions" such as the Monkey Jungle, the Orchid Jungle or the Parrot Jungle, also leased public lands and made an exempt use thereof for 1972 (as the undisputed facts established did occur at the Respondent's leasehold facility), but were taxed nonetheless, how can serious consideration be given to the Petitioners' claim that by granting the Respondent an exemption in 1972, such other facilities were discriminated against in violation of the equal protection provisions of the United States Constitution? Obviously, it cannot, and the ad valorem tax exemption of Respondent's leasehold interest is constitutionally permissible and consistent with the equal protection clause.

Further, there are additional reasons why no reviewable question is present in this case. Petitioners do not attack the statutory scheme in Florida, which permits lessees of public land to apply for and receive ad valorem tax exemption if they make an exempt use of their leasehold interest. In fact, the Petitioners do not even argue the invalidity or repugnancy of the Florida exemption statutes to support their claim of certiorari jurisdiction to this

Court.[10] 28 U.S.C.A. §1257(3). They concede, as they must, that the Florida statutes, under which Respondent applied for and received its exemption for 1972 (and the prior years), are valid and reasonable.

If the statutory exemption scheme in Florida is valid and constitutional, then it seems incongruous that Petitioners can argue any equal protection claim before this Court. Respondent has complied with the applicable ad valorem exemption statutes in Florida, and has qualified under those statutes to have its leasehold interest tax exempt as used for public purposes. (R. 226-227). Respondent has qualified for exemption because it is a lessee of county-owned property which performs a public purpose, and because it applied for such exemption. F.S. §196.199 (2)(a), *Florida Statutes*. If the other "tourist attractions" referred to by Petitioners can qualify under the applicable statutes, (as Respondent has done) and it is shown (which it has not been) that they sought a tax exemption for the same "use" of their leasehold interest, and were *denied* such exemption by the Petitioners, then it is these other "tourist attractions", and not Petitioners, who may have an equal protection claim for discriminatory tax treatment. And such a claim by these other lessees would lie against the Petitioners (Dade County), and not the Respondent herein.

But, this is not the posture of Petitioners' alleged claim. In essence, they claim that they participate in discriminatory tax treatment because "other tourist attrac-

[10]They rely on the specific provision of the third clause of §1257 which provides that certiorari may be from state court judgments which affect a title, right, privilege and immunity under the federal Constitution. (Petition for certiorari, at p. 4.)

tions", who allegedly make the same "use" of their property as Respondent, receive some unspecified but different tax treatment. This is nonsense. There is no evidence in the record that any other lessees are lessees of county-owned land, make an exempt use thereof, and have applied for exemption for the 1972 tax year. Petitioners do not have an equal protection claim merely because the Respondent has qualified for and received an exemption under the Florida exemption statutes (the validity of which they do not attack), and the other "tourist attractions", none of which have ever applied or qualified for an exemption, are taxed. As stated above, if anyone has an equal protection claim subject to the review of this Court, it is these "other tourist attractions", and not Petitioners. And that claim would be against the Petitioners, not the Respondent.

This Court should acknowledge the total want of jurisdiction under 28 U.S.C.A. §1257(3). The petition should be denied.

CONCLUSION

For the foregoing reasons, and upon the authorities cited, the Petition for Writ of Certiorari should be denied. The Petition does not demonstrate any ground for reviewing the judgment of the intermediate state court.

Respectfully submitted,

By: _____
WOODROW M. MELVIN, JR.

MERSHON, SAWYER, JOHNSTON,
DUNWODY & COLE
Of Counsel for Respondent
1600 First National Bank Building
Miami, Florida 33131

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct printed copies of the foregoing Reply to Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District were mailed this ____ day of October, 1974, to STUART SIMON, Dade County Attorney, and R. A. CUEVAS, JR., Assistant County Attorney, 1626 Dade County Courthouse, Miami Florida 33130.

WOODROW M. MELVIN, JR.

APPENDIX

IN THE SUPREME COURT OF FLORIDA

NO.

DADE COUNTY, etc., et al.,

Petitioners,

vs.

MARINE EXHIBITION CORP.,
a Florida corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

Petitioners, the Dade County taxing authorities, petition for a writ of certiorari and state:

1. Petitioners seek to have reviewed a decision of the Third District Court of Appeal dated June 25, 1974, and filed in the records of said Court on that same day, in Minute Book 55, page 250 (T. 1-2).[1]

2. This petition is presented under and pursuant to Art. V, Section 3(b)3 *Fla. Const.* of 1968 (as ratified March 14, 1972, effective January 1, 1973) and Rule 4.5c(6) Florida Appellate Rules.

[1]A copy of the decision petitioners seek to have reviewed is attached hereto as Exhibit A.

3. This petition is accompanied by a transcript of the record of the proceedings, including the decision petitioner seeks to have reviewed and a supporting brief.

4. The following are the facts of the case:

(a) Marine Exhibition Corp., a private corporation for profit, leases county-owned land and operates The Miami Seaquarium thereon as a tourist attraction. (T. 1)

(b) For 1972, the leasehold interest comprising the Seaquarium was taxed. (T. 1)

(c) The Seaquarium filed suit seeking exemption. (T. 1)

(d) By way of affirmative defense, the taxing authorities averred that the exemption sought by the Seaquarium would result in preferential tax treatment in violation of the equal protection clause of the 14th Amendment to the United States Constitution. (T. 3)

(e) In opposition to a motion for summary judgment, the assessor testified (by affidavit):

i) That other private tourist attractions located in Dade County such as: The Miami Serpentarium, The Monkey Jungle, The Orchid Jungle, and The

Parrot Jungle; which made the same use of their property as the Seaquarium made of its property were taxed; and

ii) That over 23% of the total value of all property located in Dade County was exempted from taxation (T. 4)

(f) The trial court granted summary final judgment, declaring the leasehold interest comprising the Seaquarium to be exempt from taxation. (T. 1)

5. On the foregoing facts, the court was presented with the following point of law:

> Can the Seaquarium be exempted from ad valorem taxation on the basis of the use it makes of its property, while all other private tourist attractions which put their property to the same use as the Seaquarium are taxed?

On this point of law, the Third District Court of Appeal held the Seaquarium exempt from taxation.

6. The same point of law was involved in Juarrero v. McNayr, 157 So.2d 79 (Fla. 1953).[2] In that case, Cuban refugees who owned their own home and resided in Florida under temporary visas sought homestead exemption. They contended that denial of homestead exemption deprived them of equal protection of the laws in contravention of the 14th Amendment to the United States Constitution. This court held that there was no denial of equal protec-

[2]A copy of this decision is attached hereto as Exhibit B.

tion when every other member within a reasonable classification to which Juarrero belonged was treated in the same manner.

7. The same point of law was also involved in Shevin v. Kahn, 273 So.2d 72 (Fla. 1973).[3] There, a widower had applied for and was denied the $500 widows exemption. This court held that there was no denial of equal protection as the basis of the classification for exemption was reasonable.

8. The decision of the Third District Court of Appeal which petitioners seek to have reviewed is in direct conflict with the above-mentioned cases. Because of the reasons and authorities set forth in petitioners' brief, it is believed that the decision hereby sought to be reviewed is erroneous and that the above-mentioned decisions are correct and should be approved by this court as the controlling law for the State of Florida.

WHEREFORE, petitioners request this court to grant a writ of certiorari and enter its order quashing the decision hereby sought to be reviewed, approving the above-mentioned decisions as the correct law, and granting such other and further relief as shall seem right and proper to the Court.

STUART SIMON
County Attorney
1626 Dade County Courthouse
Miami, Florida 33130

By: /s/ R. A. Cuevas, Jr.
R. A. Cuevas, Jr.
Assistant County Attorney

[3]A copy of this decision is attached hereto as Exhibit C.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for a Writ of Certiorari to the District Court of Appeal Third District, was mailed this ____ day of July, 1974, to Mershon, Sawyer, Johnston, Dunwody and Cole, 1600 First National Bank Building, Miami, Florida.

/s/ R. A. Cuevas, Jr.
Assistant County Attorney

EXHIBIT A

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1974

CASE NO. 73-995

DADE COUNTY, etc., et al.,
Appellants,

vs.

MARINE EXHIBITION CORP., a Florida corporation,
Appellee.

Opinion filed June 25, 1974.

An Appeal from the Circuit Court for Dade County, Harvie S. DuVal, Judge.

Stuart Simon, County Attorney, and R.A. Cuevas, Jr., Assistant County Attorney, for appellants.

Mershon, Sawyer, Johnston, Dunwody & Cole and Woodrow M. Melvin, Jr., for appellee.

Frank A. Howard, Jr., and Thomas G. Spicer, for the School Board of Dade County, Florida, Amicus Curiae.

Before PEARSON, HENDRY and HAVERFIELD, JJ.

PER CURIAM.

The appellant is Dade County, Florida. It appeals a summary final judgment declaring that the leasehold interest of the Marine Exhibition Corporation is not subject to taxation. The Marine Exhibition Corporation is the operator of the Miami Seaquarium. The corporation obtained the property in 1954 upon a lease from Dade County after Dade County had secured the land from the State. The deed provided that the County was to use the land for a public purpose. Pursuant to this provision, the County leased the land for a marine exhibit. The County agreed that the leasehold interest would not be taxed unless the laws of the State required it to be, and no taxes were levied until 1969. The tax here concerned is for the year 1972. In 1969, the Seaquarium property was exempted by the Board of Equilization and has been exempted as to the 1970 and 1971 taxes by order of the circuit court.

The appellant maintains that a genuine issue of material fact exists as to whether or not the property was on January 1, 1972 used for a public purpose. The only factual matter relied upon to create this issue is the affidavit of the then acting tax assessor of Dade County, as follows:

* * *

> "5. The predominant use made by the Marine Exhibition Corporation of the subject leasehold in 1972 was for a private, profit-making venture. More specifically, the vast majority of those members of the public who visited the Miami Seaquarium paid a substantial admission fee, the predominant portion of which inured to the private benefit of the Marine Exhibition Corporation. In this sense, the operation of the subject leasehold comprising the Miami Seaquarium is

no different than other privately owned tourist attractions located in Dade County, Florida, which were not tax exempt for 1972 as: the Miami Serpentarium, the Monkey Jungle, the Orchid Jungle, the Parrot Jungle."

• • •

The affidavit is insufficient to raise an issue. The fundamental questions presented by this case have been answered by the Supreme Court of Florida in Dade County v. Pan American World Airways, Fla. 1973, 275 So.2d 505.

Affirmed.

EXHIBIT B

Francisco P. JUARRERO, and Alicia V. Juarrero, his wife, as taxpayers of Dade County, Florida, and all other taxpayers similarly situated, Appellants,

v.

Irving G. McNAYR, as County Manager of Dade County, Florida, charged with the duties of the Tax Assessor of Dade County, Florida, and Sam L. Elcook, as the Acting Tax Assessor of Dade County, Florida, and Ray E. Green, as Comptroller of the State of Florida, Appellees.

No. 32589.

Supreme Court of Florida.

Oct. 23, 1963.

Suit by taxpayers to compel allowance of homestead tax exemption under the State Constitution, F.S.A. Const.

art. 10, §7, on property occupied by plaintiffs as a residence. From a final decree of the Circuit Court for Dade County, George E. Schulz, J., dismissing the complaint with prejudice, plaintiffs appealed. The Supreme Court, Roberts, J., held that alien political refugees residing in the United States by warrant of temporary non-immigrant visas could not rightfully and in good faith make residence purchased in Florida their permanent home within constitutional provision for homestead tax exemption.

Affirmed.

1. Courts—216

Under constitutional provision authorizing appeal directly to Supreme Court from judgment or decree construing a controlling constitutional provision, Supreme Court had jurisdiction of direct appeal from final decree determining that plaintiffs were not entitled under Constitution to homestead tax exemption on property occupied by them as residence. F.S.A.Const. art. 5, §4(2); art. 10, §7.

2. Taxation—219

Citizenship is not a prerequisite for claiming constitutional homestead tax exemption. F.S.A. Const. art. 10, §7.

3. Taxation—219

Alien political refugees residing in United States for indefinite stay by warrant of temporary non-immigrant visas could not rightfully and in good faith make residence purchased by them in Florida their "permanent home"

within constitutional provision for homestead tax exemption F.S.A. §192.14; F.S.A.Const. art. 10, §7.

See publication Words and Phrases for other judicial constructions and definitions.

4. Constitutional Law—87,229(2)

Denial of homestead tax exemption to alien political refugees on ground that because they had only temporary non-immigrant visas they could not rightfully and in good faith make their permanent home in Florida did not deprive them of property rights in violation of State Constitution or deny to them equal protection of the laws in violation of Fourteenth Amendment to federal Constitution. F.S.A. Const. art. 10, §7; U.S.C.A Const. Amend. 14.

Madsen & Briggs and Stewart D. Allen, Miami, for appellants.

Darrey A. Davis and St. Julien P. Rosemond, Miami, for appellees.

ROBERTS, Justice.

[1] Before us for review is a final decree of the Circuit Court in and for Dade County entered in a suit wherein the appellants sought to compel the allowance of a homestead exemption under Section 7, Article X, of the Constitution of Florida, F.S.A., such property being occupied by them as a residence. The Chancellor denied the relief, holding that appellants, under the facts alleged, are

not entitled to the homestead exemption sought. Jurisdiction of the appeal derives from Section 4(2) of revised Article V, Florida Constitution, authorizing an appeal directly to this court from final judgments or decrees construing a controlling provision of the Florida Constitution.

The material facts are simple and unchallenged. Appellants purchased a home Coral Gables, Florida, in November, 1960, after coming to this country from Cuba by dint of necessity and seeking refuge from the politically hostile government of their homeland. They are the holders of non-immigrant visas valid for unlimited applications for admission into the United States until March, 1963, which visas were issued and granted under the auspices of the American Embassy in Havana, Cuba. On or about December, 1960, appellants were granted permission by the Immigration Authorities to stay indefinitely in this country and to depart voluntarily. They do not have permanent visas and, in lay parlance, may be classified as "Cuban refugees." The visas are not authority under existing circumstances for them to remain here permanently, that is to say, beyond their immediate need for political asylum. The uncertainty of this need requires an indefinite stay although the visas are temporary in character. In this posture the controlling question is: Can an alien, temporarily absent from his homeland because of political persecution, and residing in this country for an indefinite stay by warrant of a temporary visa, make Florida in good faith his permanent home?

The Chancellor decided this question in the negative after making certain findings of fact and conclusions of law. From the decree we quote the following excerpts:

"* * * plaintiffs are temporary residents of Dade County, Florida, being non-resident aliens classified as Cuban refugees and, therefore, cannot 'rightfully' or in 'good faith' make Dade County their 'permanent home' in view of the fact that the word 'temporary' is obviously an antonym of the word 'permanent', and that the words 'good faith' purport more than honesty of endeavor or honesty of purpose and include the ability to do that which the Constitution of the State of Florida, Article X, Section 7, requires to be done."

Section 7, Article X of the Constitution of Florida provides:

"Every person who has the legal title or beneficial title in equity to real property in this State and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation, except for assessment for special benefits, up to the assessed valuation of Five Thousand Dollars on the said home and contiguous real property, as defined in Article 10, Section 1, of the Constitution, for the year 1939 and thereafter. Said title may be held by the entireties, jointly, or in common with others, and said exemption may be apportioned among such of the owners as shall reside thereon, as their respective interests shall appear, but no such exemption or more than Five Thousand Dollars shall be allowed to any one person or on any one dwelling house, nor shall the

amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person. The Legislature may prescribe appropriate and reasonable laws regulating the manner of establishing the right to said exemption. Added general election 1934, as amended general election 1938.

Section 192.14, Florida Statutes, F.S.A., provides:

"The words 'resident,' 'residence,' 'permanent residence,' 'permanent home' and those of like import, shall not be construed so as to require continuous physical residence on the property, but mean only that place which the person claiming the exemption may rightfully and in good faith call his home to the exclusion of all other places where he may, from time to time, temporarily reside."

[2, 3] Citizenship is not a prerequisite for claiming homestead exemption. See Smith, Tax Assessor, et al. v. Voight, 158 Fla. 366, 28 So.2d 426. Appellants have made every requirement for the exemption claimed within their power, and thus the question arises as a matter of law as to whether or not, under the circumstances mentioned, they possess the legal power to rightfully and in good faith make the subject property their "permanent home." We must adopt the view of the Chancellor that they cannot legally intend to do that which by law and the temporary nature of their visas they are prohibited from doing.

It is true that a resident of another state in this country may abandon residence in that state, come to Florida, purchase a home, reside in it, and declare it to be his permanent residence and become entitled to the homestead exemption provided by Section 7, Article X of our Constitution. Such person must make such declaration "rightfully" and in "good faith." This might also be true in the case of one from another country, who is in this country with a permanent visa. Such persons have the freedom and right with certainty to make and declare a bona fide intention of permanent residence in the home owned and located in this state. This is not so, however, in the case of a citizen and former resident of a foreign country who is here under the authority of nothing more than a temporary visa, because such person has no assurance that he can continue to reside in good faith for any fixed period of time in this country. Consequently, we hold he cannot "legally," "rightfully" or in "good faith" make or declare an intention which he has no assurance he can fulfill or carry out because of the temporary nature of the visa. In other words, he does not have the legal ability to determine for himself his future status and does not have the ability legally to convert a temporary residence into a permanent home.

[4] We have not overlooked appellants' contention that the denial of homestead exemptio.. to these alien refugees would deprive them of their property rights under the Constitution of the State of Florida and of their rights under the Equal Protection clause of the 14th Amendment to the Constitution of the United States. One cannot complain that he has been denied due process of equal protection of every other person within a reasonable classifica-

tion to which he belongs is treated in the same manner. These appellants constitute members of a class of Cuban refugees temporarily residing in the State of Florida under and by virtue of temporary visas, and this applies equally to other members of the same class. The decree of the Chancellor in which he dismissed the complaint with prejudice is without error and is accordingly,

Affirmed.

TERRELL, Acting C.J., and THOMAS, THORNAL, O'CONNELL, CALDWELL and HOBSON (Ret.), JJ., concur.

Robert L. SHEVIN et al., Appellants,
v.

Mel KAHN, etc., Appellee.

No. 42371.

Supreme Court of Florida.

Feb. 7, 1973.

Declaratory judgment proceeding attacking validity of tax exemption statute. The Circuit Court, Dade County, Thomas A. Testa, J., held the statute invalid and appeal was taken. The Supreme Court, McCain, J., held that Florida statute giving widows $500 exemption from taxation not violate equal protection and was valid.

Reversed.

1. Taxation —219

Term "widow" as used in statute granting widows a tax exemption could not be judicially defined to include a man who has lost his wife where legislative intent limited application of term only to woman who lost her husband by death. F.S.A. § 196.191(7).

2. Constitutional Law —229(2)
Taxation —194

Florida statute giving widows $500 exemption from taxation did not violate equal protection and was valid. F.S.A. § 196.191(7); F.S.A.Const. art. 1, § 2; U.S. C.A. Const. Amend. 14.

Robert L. Shevin, Atty. Gen., Barry Scott Richard, Deputy Atty. Gen. and Winifred L. Wentworth, Asst. Atty. Gen., for appellant.

Bill Hoppe, Miami, for appellee.

McCAIN, Justice.

Appellants appeal from a final judgment of the Circuit Court for Dade County, Florida, holding Fla.Stat. § 196.191(7)[1] invalid as a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution and Art. I, § 2, Declaration of Rights, Florida Constitution, 1968, F.S.A. We have jurisdiction pursuant to Fla. Const. Article V, §3(b)(1).

Appellee, Kahn, filed his complaint for declaratory relief as a class action pursuant to Rule 1.220, F.R.C.P., 30 F.S.A., and Fla. Stat. § 86.011, F.S.A., alleging denial of his application for a $500 tax exemption under Fla. Stat. § 196.191(7), F.S.A., and asserting that as a widower he and others similarly situated were deprived of equal protection and due process by the limitation of the exemption to "widows".

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[1]The various statutes relating to ad valorem taxation and exemptions therefrom were extensively revised by Chapter 71-133, Laws of Florida, which took effect on December 31, 1971. Inter alia Fla. Stat. § 196.191(7), F.S.A., was repealed as such and its substance incorporated in § 196.202, F.S.A., which provides:

> "Property of widows, blind persons, and persons totally and permanently disabled — Property to the value of five hundred dollars ($500) of every widow, blind person, or totally and permanently disabled person who is a bona fide resident of this state shall be exempt from taxation.

In his final judgment, the trial judge held:

> "The Florida Constitution, Article VII, Sec. 3(b) 1968, exempts every widow from taxation in the amount of $500.00 without any reference to 'widowers', [sic] and this Court is powerless to expand the meaning of 'widow' to include both women and men, it is therefore,
>
> "ORDERED AND ADJUDGED
>
> "1. That Florida Statute Sec. 196-191(7) [, F.S.A.,] applies to the feminine gender and is therefore discriminatory and arbitrary and is unconstitutional and in violation of the Equal Protection Clause of the Constitution of the United States and the Declaration of Rights, Article I, § 2 of the Florida Constitution, and Florida Statute 196.191(7) [, F.S.A.,] is inoperative and is hereby stricken."

[1] We agree that the term "widow" may not be judicially redefined to include a man who has lost his wife since the legislative intent obviously limits the application of the term only to a woman who has lost her husband by death. This definition is in conformance with the unvarying legislative and judicial use of the term in other areas.[2]

Appellee stresses that inclusion or exclusion from classification under this statute is determined by the sex

[2]See City of Jacksonville Beach v. State, 151 So.2d 430 (Fla.1963); Wilson v. Fridenburg, 19 Fla. 461 (1882); In re Estate of Yohn, 229 So.2d 612 (Fla.App. 1st, 1969); In re Beacher's Estate, 177 So.2d 838 (Fla.App.3rd, 1965).

of the individual involved. While this fact is of significance, it is not enough to declare the statute unconstitutional as a violation of equal protection of the law. Both the Florida and federal courts have upheld classifications determined by sex in other areas.[3]

All that is required to uphold the classification of widow or widower contained in the statute in question is that it be shown that it "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation."[4] We cannot agree with the assertion that the classification of "widow" is not one which rests upon such a ground of difference.

It has been ably pointed out that the object of the legislation here in question is "to reduce to a limited extent the tax burden on widows who own property to the value of $500 and . . . thereby to 'reduce the disparity between the economic . . . capabilities of a man and a woman,' . . . ." As recognized in Gruenwald v. Gardner, supra, women workers as a class do not earn as much as men.[5]

[3]In Hoyt v. Florida, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961), the United States Supreme Court unanimously affirmed the decision of this Court, Hoyt v. Florida, 119 So.2d 691 (Fla.1959), upholding a classification determined by sex for the purpose of according a privileged status to women in jury registration. In Gruenwald v. Gardner, 390 F.2d 591 (2d Cir. 1968), the United States Court of Appeals upheld the constitutionality of certain provisions of the Social Security Act which accorded women more favorable treatment than men in computing social security benefits.

[4]Reed v. Reed, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971).

[5]It is estimated that in 1970 the median annual earnings of all male workers with taxable earnings was $6,133 while only $2,734 for women. U. S. Dept. of H. E. W., Social Security Bull., Annual Statistical Supp., 1970, Table 35 at 59.

Certainly this has a "fair and substantial relation" to the ability of women property owners to pay taxes on property of even minimal value.

We recognize that steps have been and are continuing to be taken toward the elimination of legal barriers to equality of the sexes. Among the significant steps toward this end is the legislative provision for alimony and child support payments by women as well as men.[6] This provision, however, provides a means of taking into consideration the factual economic capability of each woman involved through judicial supervision and control.

Significantly, the provisions of the statute under review do not provide any means for similar consideration. Therefore, until the steps taken toward legal equality result in equality in fact, a finding of identity between the sexes at this time would rest on fiction and not fact.

[2] Accordingly, it is our judgment that Fla.Stat. §196.191(7), F.S.A., is a valid legislative enactment. Therefore, the final judgment of the Circuit Court must be and is hereby reversed.

It is so ordered.

CARLTON, C.J., ROBERTS, ERVIN, BOYD and DEKLE, JJ., and WILLIAMS, Circuit Judge, concur.

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[6]Fla.Stat. § 61.08, F.S.A. (1972).